



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Sutton Designs, Inc.--Reconsideration

File: B-235382.2

Date: August 11, 1989

DIGEST

1. Protest that agency deprived firm of opportunity to compete because protester received solicitation after closing date for receipt of proposals is denied where agency mailed solicitation materials in sufficient time to allow receipt and response, late receipt was due to misdelivery by Postal Service, adequate competition was obtained, and prices received by agency were reasonable.
2. Protest that agency should have allowed protester to submit a late proposal is denied where protester's proposal was not sent by registered or certified mail 5 or more days before the closing date, and proposal's lateness was not due to procuring agency's mishandling after receipt at the government installation.
3. Protest that scope of the solicitation duplicates existing Federal Supply Service schedules is dismissed where protester is not interested to raise the issue since it would not be in line for award if its protest were sustained.

DECISION

Sutton Designs, Inc., requests that we reconsider our May 3, 1989, dismissal of its protest under request for proposals (RFP) No. FCGS-Z6-40013-N, issued by the General Services Administration (GSA) under the Federal Supply Service (FSS) multiple awards schedule for surge suppressors and uninterruptable power supplies. Sutton protested that GSA failed to timely solicit Sutton and refused to allow Sutton to submit a late proposal. We dismissed the protest because it appeared that Sutton had not filed its protest within 10 working days of the date on which it learned that its proposal would not be considered.

In requesting reconsideration, Sutton states, and the agency does not contest, that it was not until April 28 that the protester learned that GSA would not consider its proposal. Since Sutton filed its protest on May 2, within 10 working days of this date, we will consider the merits of the protest. We deny the protest in part and dismiss it in part.

Sutton was an incumbent contractor for surge suppressors and uninterruptable power supplies on the FSS schedule solicited by the RFP. On October 14, 1988, GSA sent Sutton a pre-solicitation notice to which Sutton responded affirmatively. The RFP was synopsized in the Commerce Business Daily (CBD) on December 30 and indicated an estimated solicitation issuance date of January 14 and closing date of February 14. GSA actually issued the RFP on February 22, sending copies by first class mail to 728 companies on its mailing list.

Sutton states that it called GSA several times during the months of December and January to inform the agency that it had not received a copy of the solicitation. GSA informed Sutton that the procurement was running late and that Sutton would receive a copy of the solicitation. On March 31, Sutton learned that the closing date for the RFP had been March 30. Sutton called GSA to inform the agency that Sutton had not received a copy of the RFP and to request an opportunity to submit a late proposal. On April 6, Sutton received a copy of the solicitation in a standard GSA envelope. While the envelope was addressed correctly, the address had been marked with an "x" and the envelope marked "wrong address".

Under the Competition in Contracting Act of 1984 (CICA), agencies are required to obtain full and open competition through the use of competitive procedures when procuring property or services. 41 U.S.C. § 253(a)(1)(A) (Supp. IV 1986). "Full and open competition" is obtained when "all responsible sources are permitted to submit a sealed bids or competitive proposals." Id. at § 259(c). Accordingly, we carefully scrutinize allegations that a firm has not been provided an opportunity to compete for a particular contract and take into account all of the circumstances surrounding the firm's nonreceipt of solicitation materials, as well as the agency's explanations. Keener Mfg. Co., B-225435, Feb. 24, 1987, 87-1 CPD ¶ 208. In this regard, we will consider that the agency has met its obligation if it has made a diligent, good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials and it obtains competition and reasonable prices. Rut's Moving & Delivery Serv., Inc., 67 Comp. Gen. 241 (1988), 88-1 CPD ¶ 139.

We find that GSA made an appropriate effort here, and obtained adequate competition and reasonable prices. First, GSA did solicit Sutton. While Sutton did not receive the RFP until after the March 30 closing date, GSA states that all the solicitation packages were mailed on February 22. Apparently, the Postal Service misdelivered the solicitation materials. Sutton submitted to us a letter from its local post office which states that "it is possible that one of our carriers misdelivered the letter in February and the party to which it was delivered to in error delayed its proper delivery." We conclude from the record that GSA mailed the solicitation package to Sutton in sufficient time for Sutton to receive the RFP and respond. In this regard, we have held that procuring agencies are not insurers of the delivery of solicitation documents to prospective offerors, and those firms bear the risk of nonreceipt. Harris Corp., PRD Elecs. Div., B-209154, Oct. 13, 1982, 82-2 CPD ¶ 332.

Sutton argues that GSA may not have sent the solicitation until after the closing date when Sutton complained that it had not received the solicitation. Sutton contends that the mailing label on the bid package appears to be "hand typed" and is of a different format than the listing for Sutton on the agency's computerized mailing list. Sutton argues that this supports its argument that the solicitation was mailed after the closing date. This argument, however, ignores the evidence that the solicitation package received by Sutton had been misdelivered, and Sutton has offered no explanation for the markings on the envelope which indicate that the package had been delivered to the wrong address.

In any event, the record shows that GSA made a significant effort to obtain competition by publishing the CBD notice, sending pre-solicitation notices and sending copies of the solicitation to 728 potential offerors. As a result, GSA received 42 offers from which GSA was able to determine that it had received reasonable prices. Under the circumstances, we have no basis to conclude that GSA did not comply with its statutory and regulatory obligations to obtain full and open competition.

Sutton also contends that GSA should have permitted Sutton to submit a late proposal because of Sutton's late receipt of the solicitation materials. The solicitation incorporated the standard late proposal clause appearing at Federal Acquisition Regulation § 52.215-10 (FAC 84-17), which permits the government to consider a late proposal only if it was sent by registered or certified mail 5 or more days before the date specified for receipt of offers or if the proposal's lateness was due solely to mishandling by the

government after receipt at the government installation. Since neither of these exceptions is applicable here, GSA properly refused to allow Sutton to submit a late proposal.

Finally, Sutton protests that the RFP duplicates the scope of existing FSS schedules for surge suppressor and uninterruptable power supplies. However, Sutton is not an interested party under our Bid Protest Regulations to object to the scope of the RFP since GSA properly concluded that it could not consider Sutton's late proposal. See 4 C.F.R. § 21.0(a), § 21.1(a) (1988). A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. State Technical Institute at Memphis, 67 Comp. Gen. 236 (1988), 88-1 CPD ¶ 135. Since Sutton did not submit a timely proposal in response to the RFP and thus would not be in line for award, it is not interested to challenge the scope of the solicitation.

The protest is denied in part and dismissed in part.



James F. Hinchman
General Counsel